



U.S. District Judge Ed Kinkeade, of the Northern District of Texas
Photo: Thomas Phillips/ALM

After Johnson & Johnson got hit with a \$1 billion verdict last week, plaintiffs lawyers were quick to paint a portrait of the company as an aggressive litigator uninterested in settling whose actions have prompted juries to award gargantuan punitive damages. It's the same refrain that plaintiffs attorneys have been touting this year as Johnson & Johnson has gotten hammered with five big verdicts over its hip implants and talcum powder products.

But it's not a complete picture. Attorney John Beisner, who oversees all of Johnson & Johnson's products liability litigation, said 2016 just happened to be a bad year for trials. But he also pointed out that the verdicts have come out of just two courtrooms, where judges in both matters have allowed jurors to hear evidence that never should have been introduced—a key argument in appeals that have just begun.

"In both of these proceedings, the courts have been permitting the juries to hear a lot of 'evidence' that has nothing to do with the case or has no foundation," said Beisner, leader of the mass torts, insurance and consumer litigation group at Skadden, Arps, Slate, Meagher & Flom. "I'm not talking about a little indiscretion. This is whole swathes of evidence that were allowed to be placed before the jury."

To be sure, Pinnacle hip implants and talcum powder aren't Johnson & Johnson's only legal problems. A big player in pharmaceutical drugs and medical devices, the New Brunswick, New Jersey-based company has another 60,000 lawsuits against it over its transvaginal mesh devices, blood thinner medication Xarelto and prescription antipsychotic Risperdal.

But on Dec. 1, a federal jury in Dallas awarded \$1.04 billion to six plaintiffs who claimed that Johnson & Johnson's DePuy Orthopaedics Inc. unit failed to warn about defects in its Pinnacle hip implants that caused pain and subsequent removal surgeries. It was the third bellwether in multidistrict litigation that involves

more than 8,500 cases. In March, another federal jury in Dallas awarded \$502 million to five plaintiffs over the same device.

Lead plaintiffs lawyer W. Mark Lanier was quick to demand Johnson & Johnson settle the Pinnacle cases given that "anyone who sees the evidence will be appalled" at its conduct. Plaintiffs attorney Ted Meadows made similar remarks about Johnson & Johnson's conduct after winning verdicts of \$55 million, \$70 million and \$72 million in cases alleging its talcum powder products caused women to get ovarian cancer.

In litigation over transvaginal mesh devices, plaintiffs attorneys have blamed Johnson & Johnson's legal strategy when explaining why its Ethicon Inc. unit has [refused to settle](#) while defendants with similar devices have resolved similar suits.

But there's another side to that portrayal.

Johnson & Johnson's ultimate goal is "to generate the most closure possible for the least amount of money," said Elizabeth Burch, a professor at the University of Georgia School of Law who follows mass torts. Like other pharmaceutical and medical device firms, Johnson & Johnson has adapted its strategy based on various factors, such as whether the product was recalled. In 2013, for instance, Johnson & Johnson paid \$2.5 billion to settle lawsuits by about 8,000 people over ASR hip implants, a recalled product made by DePuy. But Johnson & Johnson still sells its iconic baby powder, the main product at issue in the talcum powder litigation.

"It's much more difficult when you're still marketing the product to try to get the kind of closure you'd want to get through a massive settlement," Burch said. "So your best strategy is to play hardball and convince plaintiffs attorneys to stop bringing those cases."

Johnson & Johnson, which expects worldwide sales this year to surpass \$72 billion, has an arsenal of trial teams. In the hip implant litigation, Quattlebaum, Grooms & Tull of Little Rock, Arkansas, stepped in for the third trial after Locke Lord lost the second one. In the talcum powder litigation, a team from Shook, Hardy & Bacon handled the first two trials, with Nelson Mullins Riley & Scarborough coming in for the third.

Johnson & Johnson's lawyers express confidence that the verdicts will get reversed on appeal. Already, the \$502 million verdict has been revised downward to \$150 million under Texas law.

In the talcum powder cases, Johnson & Johnson has insisted that 22nd Judicial Circuit Court Judge Rex Burlison allowed scientific evidence into trial that should never have been there. And in the hip implant litigation, the company has chastised U.S. District Judge Ed Kinkeade of the Northern District of Texas, a George W. Bush appointee, for changing the bellwether trial plan from individual trials, as was the case in the first trial that ended with a defense win in 2014, to those involving multiple plaintiffs. Johnson & Johnson also has attacked the judge for his evidentiary rulings.

If those verdicts get reversed, Johnson & Johnson might finally find settlement to be more advantageous, Burch said.

"Even though you have these huge verdicts for juries, plaintiffs lawyers have to spend lots of money on jury cases," she said. But with verdicts reversed on appeal, Johnson & Johnson "can negotiate down the value of the settlement."